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SPORT AND HUMAN RIGHTS

Prof. Avv. Jacopo Tognon

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INTRODUCTION

- What does sport have to do with human rights?
- Certainly, there is a **political relevance** of human rights in sport; from fighting racism, sexism and homophobia to standing up for the rights of the workers building stadiums;
- Protest linked to human rights has long been a feature of sport; e.g., John Carlos and Tommie Smith's black-gloved fists and Olympic Project for Human Rights badges during their medal ceremony at the 1968 Mexico City Olympics!
- And Major sporting events (like the Olympics) provide to human rights activists an opportunity to **raise awareness of human rights** abuses e.g. in the host country

HUMAN RIGHTS DEFINITION

- The expression “human rights” indicates a **broad area of legal concern**, ranging from issues of torture and slavery to social, cultural and economic issues, trying to protect individuals from authorities’ abuses;
- Human rights is a convenient expression of reference but is also a source of potential legal confusion; human rights issues arise in specific factual and legal contexts and must be dealt with in relation to the applicable law.
- When we discuss about **promotion we imagine the so called CSR: corporate social responsibility**
- Human rights can be dealt with both as a matter of domestic law and as a matter of international law > in this class, we will see the international dimension

UN CHARTER

The arrival of human rights on the international scene was a remarkable event; it was a subversive doctrine bound to foster tension among States

The Preamble of the United Nations Charter of 26 June 1945 so reads:

I. Introduction

«We the Peoples of the United Nations

Determined

to save succeeding generations from the scourge of war,

which twice in our lifetime has brought untold sorrow to

mankind, and to reaffirm faith in **fundamental human rights**, in the

dignity and worth of the human person, in the equal rights of men and women

and of nations large and small, and to establish conditions under which justice

and respect for the obligations arising from treaties and other sources of

international law can be maintained, and to promote social progress and better

standards of life in larger freedom”

MODERN DOCTRINE

- In modern international law (since 1945), the doctrine of human rights force States to give account of how they treat individuals, vis-à-vis both other States and individuals themselves.
- Nowadays, human rights are considered to be directly attributed to individuals, who are sometimes entitled to internationally invoke them against sovereign States; conversely, individuals may also be personally and directly responsible of human rights violations under international law
- The most advanced procedural mechanism to foster international respect of human rights can be found in the context of the European Convention on Human Rights

- The European Convention on Human Rights-

- On 10 December 1948, the UN General Assembly proclaimed the Universal Declaration of Human Rights; it was a non-binding resolution. In 1949 a number of European States founded the Council of Europe
- In 1950, the member States of the Council of Europe drafted and signed a fundamental international treaty: the European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”)
- The ECHR was opened for signature in Rome on 4 November 1950 and it entered into force on 3 September 1953; The ECHR is a “closed” treaty: it is open for signature and ratification only to Member States of the Council of Europe (currently 47 contracting parties)

- The European Convention on Human Rights-

- Art. 1 of the ECHR is entitled “Obligation to Respect Human Rights”:
“The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”
- The ECHR includes 3 Sections: I. Rights and Freedoms (Articles 2-18) II. European Court of Human Rights (Articles 19-51) III. Miscellaneous Provisions (Articles 52-59)
- The importance of the supervisory system: the European Court of Human Rights. The Court's judgments are binding on States, which are required to take all necessary measures to comply with them; the Committee of Ministers supervises the implementation of Court judgments

- Is the ECHR binding on sports bodies? -

- Given that the ECHR protects individuals against the abuses of State authorities and given that sports institutions are private authorities, how could the ECHR be relevant for sports bodies?
- Indeed, the ECHR directly binds sovereign States, not private parties
States must control, in particular through their judiciary system, that private parties respect fundamental rights
- Accordingly, the ECHR is indirectly relevant in the context of sports proceedings (disciplinary and others) within States that are parties to the ECHR
- Both **procedural rights** (in particular, the right to a fair trial) **and substantive rights** (e.g., freedom of association, freedom of expression, right to privacy) can be of relevance in sports legal proceedings

Article 6 ECHR: “Right to a Fair Trial”

- It's very important to distinguish between proceedings concerning civil matters (only art. 6 § 1 ECHR applies) and proceedings concerning criminal matters (the whole art. 6 ECHR applies)
- Sport proceedings concerning disputes between clubs (e.g. transfer issues) or between players or coaches and clubs (e.g. employment disputes), such as proceedings before the FIFA DRC and PSC, are unquestionably related to “civil rights and obligations”
- What about sport disciplinary proceedings?
- Are they related to “civil rights and obligations” or to criminal charges?

Article 6 ECHR: “Right to a Fair Trial” -

Meaning of “criminal charge” under Art. 6 ECHR:

The European Court of Human Rights **sets forth three main criteria** to define the ECHR’s meaning of “criminal charge” as opposed to a mere “disciplinary charge of a civil character” (Judgment 8 June 1976, Engel v. The Netherlands):

1. Classification under the accused State’s domestic law

Only a starting point of the analysis: majority of countries (e.g. Swiss law) **considers sports disciplinary matters as civil matters** (SFT, 15 March 1993, Gundel v. FEI)

2. Nature of the offence

If the violated rule only applies to a restricted group of people, such as a profession, this would indicate that it is a disciplinary and not a criminal rule: Most sports disciplinary offences are not considered as crimes by States’ legislations

3. The nature and severity of the risked penalty

Imprisonment or other serious deprivation of liberty indicates that the charge is criminal: Sports sanctions do not provide for imprisonment or loss of liberty

-> Sports disciplinary proceedings are civil proceedings, not criminal proceedings!!

-> Rights to be guaranteed in civil proceedings

Article 6 ECHR: “Right to a Fair Trial” -

The art. 6 “five principles”:

1. Right of access to a State Court
2. Right to a fair proceedings
3. Right to a public hearing and a public judgment
4. Right to have a decision within a reasonable time
5. Right to an independent and impartial Tribunal

1. Right of access to State courts

Mandatory arbitration is compatible with Art. 6 § 1 according to the following criteria (ECtHR, Judgment 8 July 1986 *Lithgow et al. v. UK*):

- a) “The right of access to the courts secured by Article 6 § 1 is not absolute but may be subjected to limitations”
- b) “Contracting States enjoy a certain margin of appreciation, but the final decision as to observance of the Convention’s requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual ... to such an extent that the very essence of the right is impaired”
- c) “a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship between the means employed and the aim sought to be achieved”

Reasons in terms of “good administration of justice” may justify a specialized arbitral institution: in sports there is a need for uniformity of rules and consistency of decisions

1. Right of access to State courts

European Court of HR point of view:

There is no doubt that a **voluntary waiver of court proceedings in favor of arbitration is in principle acceptable** from the point of view of Article 6» (Judgment of 23 February 1999, Suovaniemi et al. v. Finland)

Sport arbitration is possible but arbitral tribunals are indirectly bound to grant the rights of art. 6.1

CAS point of view:

the Panel is mindful that some guarantees afforded in relation to civil law proceedings by article 6.1 of the ECHR are indirectly applicable even before an arbitral tribunal – all the more so in disciplinary matters – because the Swiss Confederation, as a contracting party to the ECHR, must ensure that its judges, when checking arbitral awards (at the enforcement stage or on the occasion of an appeal to set aside the award), verify that parties to an arbitration are guaranteed a fair proceeding within a reasonable time by an independent and impartial arbitral tribunal. These procedural principles thus form part of the Swiss procedural public policy» (CAS 2011/A/2426 Adamu v. FIFA, § 66)

Under the ECtHR jurisprudence, **CAS arbitration may be a valid alternative to the access to State courts if the arbitration proceedings constitute a true equivalent to State court proceedings**

2. Right to Fair Proceedings

SEVEN important concepts to remember:

1) Time limits to appeal:

Unless there is an urgent need for a quick decision because of an ongoing competition, time limits must be reasonable (e.g., Art. R49 CAS Code: 21 days)

2) Scope of review:

There must be a right to a de novo review. E.g. CAS panels have full power to review the facts and the law (Art. R57 CAS Code, although problematic new paragraph)

3) Evidence: The right to submit evidence and to request evidentiary measures must not be limited

4) Interim measures: The right to request interim measures must not be limited

5) Ensuing appeal to a State Court: The right to appeal against an arbitral award may not be excluded, even though the applicable domestic law may allow it for normal arbitrations (e.g. Article 192.1 PILA)

6) Right to an adversarial process

7) Right to procedural equality

3. Right to a Public Hearing and a Public Judgment

ECHR Jurisprudence:

«The public character of proceedings before the judicial bodies referred to in Article 6 § 1 protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts, superior and inferior, can be maintained. **By rendering the administration of justice visible**, publicity contributes to the achievement of the aim of Article 6 § 1, namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society» (Judgment 8 December 1983, Pretto et al. v. Italy)

SWISS FEDERAL TRIBUNAL STATEMENTS:

it is not possible to derive a right to a public hearing in the framework of arbitration proceedings”. However it added that **“in view of the outstanding significance of the CAS in the field of sport, it would be desirable for a public hearing to be held on request by the athlete concerned with a view to the trust in the independence and fairness of the decision making process”** (Judgment 10 February 2010, 4A_612/2009, Pechstein v. ISU)

4. Right to a Decision within a Reasonable Time

ECHR jurisprudence:

«many member States of the Council of Europe have a long-standing tradition of recourse to other means, besides reading out aloud, for making public the decisions of all or some of their courts...

The Court therefore does not feel bound to adopt a literal interpretation.

...the object pursued by Article 6 § 1 in this context - namely, to ensure scrutiny of the judiciary by the public with a view to safeguarding the right to a fair trial – is ... no less **achieved by a deposit in the court registry, making the full text of the judgment available to everyone,** than by a reading in open court» (Judgment 8 December 1983, Pretto et al. v. Italy)

-> Decision within a reasonable time: many examples, especially in the CAS ad hoc division!

5. Right to an Independent and Impartial Tribunal

*“there are weighty, objective grounds for not referring disputes between athletes and sports governing bodies in connection with international competitions to the various national courts that could come into consideration, **but rather allocating these to a dedicated sports court.** In particular the uniform jurisdiction and procedural structure of this method can prevent similarly structured cases being subject to divergent outcomes, which serves the principle of the equality of opportunity for athletes participating in competitions» (Pechstein saga, Munich Higher regional Court)*

Dedicated sports court

Right to an Independent and Impartial Tribunal

Which will be the future of sports arbitral Tribunal (as CAS and BAT, e.g.)?

From CAS perspective (opinion from scholars): 3 changes are fundamental

1. ICAS composition

2. Presidents of the 2 CAS divisions

3. Panel's chairman in appeals cases

We could discuss for all the week these issues...

Sport and Human Rights

These are the most important things to remember when we are thinking about sport and HR under the procedural point of view....

But what about substantive and practical issues outside the proceedings that a National Federation and an Olympic Committee have to pinpoint?

THANK YOU FOR YOUR ATTENTION

jacopo.tognon@unipd.it

jacopotognon@avvocatitognon.com